



No. 98-1189

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1998

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THE BOARD OF REGENTS OF THE  
UNIVERSITY OF WISCONSIN, *et al.*,  
*Petitioners,*

v.

SCOTT HAROLD SOUTHWORTH, *et al.*,  
*Respondents.*

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On Petition for Writ of Certiorari to the  
United States Court of Appeals for the Seventh Circuit

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**BRIEF IN OPPOSITION**

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## QUESTIONS PRESENTED

Whether students at the University of Wisconsin have a First Amendment right under *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) and its progeny to opt out of paying a mandatory fee that funds private campus organizations engaged in political and ideological advocacy that the students forced to pay find objectionable, even if the University distributes the funds in a viewpoint-neutral forum like the one in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995)?

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## BRIEF OF THE STUDENTS IN OPPOSITION

The main question in this case is whether a state university can violate the free speech rights of students under *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) to opt out of paying a mandatory fee funding political and ideological advocacy of private campus groups. The University of Wisconsin ("University") claims that students lose their *Abood* rights to opt out of paying a mandatory fee if the University operates a viewpoint neutral forum of money like the one in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995). But this Court did not intend for *Rosenberger* to nullify students' *Abood* rights. The Seventh Circuit accurately ruled that the University needlessly pits *Abood* against *Rosenberger*, stating that the First Amendment principles addressed in *Rosenberger* deal with the distribution of student fees, while the principles of *Abood* address the collection of student fees. Therefore, the Seventh Circuit correctly ruled that students have a First Amendment right under *Abood* to opt out of paying a mandatory fee that funds the political and ideological advocacy of private campus organizations, even if the fee money is distributed in a viewpoint neutral manner as required by *Rosenberger*.

## STATEMENT OF THE CASE

In its petition for a writ of certiorari, the University of Wisconsin neglected to state important facts about this case. The students requested an opt out from mandatory funding of campus organizations that engage in blatant political and ideological activism. For example, the students objected to funding organizations that published voter guides evaluating how well candidates for Congress supported the organization's legislative agenda, and they objected to funding various organizations that lobbied the Wisconsin Legislature for

support or defeat of various pieces of legislation.

### **The University Requires Students to Pay the Fee**

The Board of Regents requires all students enrolled at the University of Wisconsin-Madison to pay a mandatory fee, called the "segregated fee." Appellees' Appendix at the Seventh Circuit ("A.A.") at 131. The University will not allow students to graduate or receive their grade transcripts if they refuse to pay the mandatory fee. Answer ¶ 9. There is no way that students may receive a refund of the portion of the fee that funds campus organizations the students find objectionable. Answer ¶ 1. Full-time students attending the University of Wisconsin-Madison during the first semester 1995-96 school year were required to pay a mandatory fee of \$331.50. A.A. at 132.

A large portion of the student fee money pays for things not at issue in this case -- the student health service, a shuttle bus service, the campus radio station, a study help center, etc. A.A. at 136. In this case, the students only objected to the funding of campus organizations who engaged in political and ideological advocacy.

### **The Fee Funds Less Than 1/3 of All Campus Groups**

Most student groups at the University of Wisconsin - Madison flourish and speak their diverse voices without any subsidies coerced from unwilling students. In the 1995-96 school year, there were 623 Registered Student Groups at the University of Wisconsin-Madison. Appellees' Appendix ("Ae.A.") at 218-34. The total number of student organizations that received any fee money at all was 183, A.A. at 139, meaning that 29% of the registered student groups received funding from the fee and 71% of the student groups did not

even apply for funding and operated successfully on campus without using money coerced from others. Most of the student organizations that receive mandatory fee money received \$1000 or less. A select group of 17 campus organizations received large allotments from the mandatory fee, ranging from \$6905.00 to \$481,673.00 each for providing "services" to students on campus. A.A. at 139. Some of these services were legitimate services with no component of advocacy, such as the shuttle bus and the study center. Those services are not challenged in this lawsuit. However, a number of these groups received thousands of dollars and the only "service" they provided were such things as organized lobbying efforts at the state capitol on the organization's legislative agenda, work on the causes promoted by the funded organization and the "service" of disseminating the funded organization's viewpoints on campus.

Student organizations seeking funding must go through an extensive application process. Although any Registered Student Organization may apply for funding, the student government and the Board of Regents determine which organizations will receive money and how much. A.A. at 135-141. There is no guarantee that a student organization will receive any money at all from the mandatory fee fund. The student government and the Board of Regents have total discretion to decide which organizations will have access to the forum of mandatory fee money. The student government funds the Wisconsin Public Interest Research Group (WISPIRG) with mandatory fee money through a separate account only for that organization. A.A. at 134.

### **The Funded Campus Organizations Engage in Political and Ideological Advocacy**

In the record before the Seventh Circuit, the students

who object to paying the fee presented myriad examples of funded campus organizations engaging in political or ideological advocacy. Here are some examples to show why the students sought to opt out of paying the fee.

### WISPIRG

The Wisconsin Public Interest Research Group (WISPIRG) received \$49,500.00 from the segregated fee during the 1995-96 school year. Cert. Pet. at 18a. WISPIRG describes itself as "one of the state's leading consumer and environmental watchdog groups." Ae.A. at 13. WISPIRG published a Congressional scorecard for the 1994 election in which it evaluated each candidate for the House of Representatives from every congressional district in Wisconsin, and gave scores depending on whether the candidate supported or opposed the WISPIRG legislative agenda. Cert. Pet. at 18a.

During the 1995-96 Session of the Wisconsin Assembly, WISPIRG asked legislators to introduce three bills to restrict mining in Wisconsin. *Id.* All three of these bills say that they were introduced "by request of ... Wisconsin Public Interest Research Group (WISPIRG)." On April 21, 1996. WISPIRG and the UW Greens (another fee-funded group) led a "Wisconsin Earth Day March" to the State Capitol to protest Governor Tommy Thompson's budget, and "composted" the budget once they reached the Capitol building. Cert. Pet. at 18a-19a. Additionally, WISPIRG sends one quarter of its student fee money each year to support WISPIRG's parent organization, U.S. PIRG, in Washington D.C. to support U.S. PIRG's lobbying at the U.S. Congress. *Id.* at 18a.

### Campus Women's Center

The Campus Women's Center received \$34,200.00

from the segregated fee during the 1995-96 school year. Cert. Pet. at 19a. The Campus Women's Center was created in 1983 "as a student organization committed to working against sexist attitudes and behaviors in order to strengthen the entire community." Appellees' Brief to the Seventh Circuit, 97-1001, p. 13.

During the 1996 session of the Wisconsin Legislature, the Campus Women's Center worked against a bill requiring "informed consent" from women seeking abortion and requiring a 24 hour waiting period. Ae.A. at 69. The Campus Women's Center wrote:

We must act now to block the bill. You can obtain a copy of the bill at the Legislative Reference Bureau. Familiarize yourself with its contents and get prepared to defend women's rights to reproductive choice when the bill hits the Senate floor in March. For more information or to find how you can become further involved, contact Jennifer at the Campus Women's Center: 262-8093. ♀

Cert. Pet. at 19a.

The Campus Women's Center published articles in its newsletter urging people to oppose another bill on abortion at the Wisconsin Legislature and to defeat a "Defense of Marriage Act" bill that would have prohibited legal recognition for same sex marriages. Ae.A. at 82-83.

### UW Greens

The UW Greens received \$6,905.00 from the segregated fee during the 1995-96 school year. Cert. Pet. at



18a. The UW Greens describe themselves as part of a movement that "provides an opportunity for a merger of spiritual, community and alternative institutions. This synthesis, in combination with political action, will ultimately lead to the changes which are necessary in society if we are to maintain the earth and its inhabitants." Ae.A. at 105.

During the 1996 presidential campaign, the UW Greens distributed from their office campaign literature supporting Ralph Nader's bid for President on the Green Party ticket, as well as general information about the Green Party USA, a political party. Cert. Pet. 18a. The UW Greens lobbied at the state legislature on various bills dealing with mining. *Id.* The record shows that the UW Greens opposed use of Bovine Growth Hormone in milk and dairy products, urged people to boycott Shell Oil and embargo Nigerian exports because of Nigeria's alleged environmental and human rights abuses, and oppose "Structural Adjustment Programs" imposed by the World Bank on poor Third World nations. Ae.A. at 111, 113, 115 and 117.

### **Progressive Student Network**

During the 1995-96 school year, the Progressive Student Network received a grant from the mandatory fee of \$590.00. A.A. at 147. This activist group "focuses on a wide variety of current issues including military/biotech research on campus, ROTC discrimination against queers, racist mascots in sports, the crisis of hunger and homelessness, free trade (NAFTA/GATT), welfare reform, political prisoners and prison organizing, environmental racism, ecofeminism and women's empowerment, rightwing backlash on campus, the GOP's 'Contract with America,' etc..." Cert. Pet. at 20a.

The Progressive Student Network also distributes its

Disorientation Manual at the UW-Madison campus, a publication funded by the mandatory student fee. The Disorientation Manual criticized the Board of Regents and Governor Tommy Thompson for the way they spent money on projects and programs at the University. The Disorientation Manual also promoted homosexuality:

Congratulations! You've stepped out of whatever homohating hometown you probably "grew up" in and have come to the only Midwestern mecca where gay rights exist, bisexuals can flirt shamelessly, and our family is so comfortable that we can even afford that sociopolitical luxury of infighting.

Of course, isn't it odd that the military Reserve Officer Training Corps (ROTC) openly discriminates against homosexuals but is still allowed on campus (despite UW policy). Also, spouses of UW students get UW health benefits, while legally-sanctioned "domestic partners" (the only way for homosexuals to marry in WI) of UW students don't.

Ae.A. at 172.

### **International Socialist Organization**

During the 1995-96 school year, the International Socialist Organization received an operations grant from the segregated fee of \$350.00. A.A. at 121.

The International Socialist Organization promotes socialism through debates, rallies, conferences, etc. The organization had an Internet web page during the 1995-96



school year in which it espoused its various ideas:

Although workers create society's wealth, they have no control over its production and distribution. A socialist society can only be built when workers collectively seize control of that wealth and democratically plan its production and distribution according to human needs instead of profit...

Reforms within the capitalist system cannot put an end to oppression and exploitation. Capitalism must be overthrown.

Cert. Pet. at 19a; Ae.A. at 134.

The International Socialist Organization opposes the Republicans' Contract with America, supports affirmative action, and opposes "racism, sexism and homophobia." Ae.A. at 138-39; 141.

The International Socialist Organization, along with the UW Greens and other groups, co-sponsored a series of events on May 5-6, 1996 to celebrate International Workers Day. The events included a "Worthy Wage Rally in support of child care workers" at the state capitol and a rally in support of workers' rights at Congressman Scott Klug's office. Cert. Pet at 19a; Ae.A. at 144.

On April 12, 1995, the International Socialist Organization joined with others in a demonstration at a predominantly black church in Madison because it was sponsoring two speakers who oppose homosexuality. Cert. Pet. at 19a; Ae.A. at 128-131. About 400-500 demonstrators

massed outside of the church, holding signs, chanting, blowing whistles, beating metal garbage can lids, etc. Ae.A. at 129. The protestors chanted "Queer Mob Rule," "Hey, Hey, Ho, Ho, Homophobia's Got to Go and "2, 4, 6, 8, We Don't Want Your Christian Hate." *Id.* One demonstrator repeatedly shouted, "Bring Back the Lions," alluding to the Roman Empire's persecution of the early Christians. *Id.*

### Other student organizations

The students who filed this lawsuit also submitted evidence of other student organizations funded by the mandatory fee that have engaged in political or ideological advocacy. See Ae.A. at 183-87; 192-97; 198-201; 44-62; 119-120; 210-11; 212-17; 202-3; 208-9; 204-5; 206-7; 145-161; 188-91:

- Amnesty International
- Community Action on Latin America
- La Colectiva Cultura de Aztlán
- Lesbian, Gay Bisexual, Transgender Campus Center
- Madison AIDS Support Network
- MADPAC
- Madison Treaty Rights Support Group
- Militant Student Union
- National Organization for Women (student chapter)
- Student Labor Action Coalition
- Student Solidarity
- Ten Percent Society
- United States Student Association

### The Objecting Students

The complaint was filed by three law students enrolled at the University of Wisconsin-Madison's law school. Other

students joined the lawsuit as the original plaintiffs graduated. All of the students described themselves as holding a conservative political philosophy and beliefs, as well as a Christian religious faith. Appellees' Brief to the Seventh Circuit, 97-1001 at 6-8. The students oppose legalized abortion and homosexuality, support the free enterprise system, reasonable environmental regulations and the Contract for America, among other positions. *Id.*

These students believe that all students have the right to express their opinion at the University by distributing literature on campus, renting rooms at the University for speakers advocating their viewpoints, lobbying the Wisconsin Legislature and the Congress, supporting and opposing political candidates, conducting protest marches, etc. *Id.* However, they object to the views of many of the student groups receiving funding from the segregated fee. They believe that they should be able to attend the University without the Board of Regents requiring them to fund student groups who express views they oppose. *Id.*

The students filed their action under 42 U.S.C. §1983, seeking the right to opt out of paying the portion of the mandatory fee that funds the organizations they find objectionable. The district court and the Seventh Circuit both agreed that the students have a First Amendment right to opt out of paying the mandatory fee under *Abood* and its progeny, such as *Keller v. State Bar of California*, 496 U.S. 1 (1990) and *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991). By a 7-4 vote, the Seventh Circuit rejected the University's petition for rehearing en banc.

## REASONS FOR DENYING THE WRIT

### I.

#### THE SEVENTH CIRCUIT CORRECTLY RULED THAT *ABOOD* PRINCIPLES CONTROL THIS CASE, NOT THOSE OF *ROSENBERGER*

##### A. This Court Indicated in *Rosenberger* That *Abood* Governs a Student Fee Opt Out Case.

This Court need not review the Seventh Circuit's decision because it correctly applied the *Abood* principles as explained by this Court in *Rosenberger*. The Seventh Circuit ruled that students have a First Amendment right as explained in *Abood*, *Keller*, *Lehnert*, and other decisions, to opt out of funding political and ideological advocacy of private campus organizations, even if the money is distributed through a *Rosenberger*-type nonspatial forum of money in a viewpoint-neutral manner.

The students have not asked in this lawsuit that certain campus organizations be censored or silenced on campus, or that certain groups totally be cut off from funding from the mandatory fee. The Seventh Circuit correctly stated the students' constitutional claims in this case: "But the students do not ask that we restrict the speech of any student organization; they merely ask that they not be forced to financially subsidize speech with which they disagree." *Southworth v. Grebe*, 151 F.3d 717, 721 (7th Cir. 1998); Cert. Pet. at 20a. The students have asked, like the dissenting workers in *Abood*, that the government not force them to fund the political and ideological advocacy of private organizations. The University is free to distribute money in a viewpoint-neutral manner (*Rosenberger*) if the funds are collected from students who voluntarily

contribute it (*Abood*).

The Seventh Circuit correctly stated that the students have sought protection for their First Amendment right not to speak, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) and their right not to be compelled to subsidize others' speech, as stated in *Abood* and *Keller*. See *Southworth*, 151 F.3d at 722; Cert. Pet. at 22a. Therefore, the students seek to opt out of contributing to a fund that finances advocacy of groups they find objectionable. The organizations are free to continue advocating their viewpoints, but with money that has been voluntarily contributed.

The University claims that if it could show that it operates a viewpoint-neutral forum of funding like that at issue in *Rosenberger*, then the students have no *Abood* right to opt out and the University may force students to pay the fee that funds groups they find objectionable. But this is not what the First Amendment requires. There is no conflict between *Abood* and *Rosenberger*. The University (and the Seventh Circuit dissenters from denial of rehearing en banc) needlessly thrust *Rosenberger* into conflict with *Abood*.

The Seventh Circuit properly read *Rosenberger* to address the constitutional principles surrounding the distribution of mandatory student fees, and *Abood* to address constitutional principles relevant to the collection of student fees. The Seventh Circuit stated:

The Regents try to shoehorn this case into *Rosenberger*. However, as the Court made abundantly clear, it considered only the disbursement of student activity fees; it did not consider the constitutionality of forcing students to fund private political and ideological

organizations. *Rosenberger*, 515 U.S. at 840.

*Southworth*, 151 F.3d at 722, n. 1; Cert. Pet. at 23a, n.1.

The Eighth Circuit recently reached the same conclusion about the application of *Rosenberger* to mandatory student fee cases involving the University of Minnesota:

The nondiscriminatory distribution by the University of funds available for the support of student organizations as required by *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 132 L. Ed. 2d 700, 115 S. Ct. 2510 (1995), is not at issue in this action because the University's system for distributing the fees collected has not been challenged by the plaintiffs. Rather, the plaintiffs challenge only the right of the University to compel them to pay fees for the support of advocacy groups they do not wish to support. Cf. *id.* at 840.

*Curry v. Regents of the University of Minnesota*, \_\_\_ F.3d \_\_\_, 1999 U.S. App. LEXIS 1459, \*4 n. 4 (8th Cir. Feb. 1, 1999).

This Court in *Rosenberger* directed that the question of whether students have a First Amendment right to opt out of funding objectionable campus advocacy groups was controlled by *Abood* and *Keller*, and was not answered in *Rosenberger*. 515 U.S. at 840. The Seventh Circuit followed this direction:

While *Rosenberger* did not consider the question we have before us, in noting what was not before it, the Court directed us to the *Abood* and *Keller* analysis.



*Southworth*, 151 F.3d at 722; Cert. Pet. at 22a. The Seventh Circuit then referenced this passage from this Court's majority opinion in *Rosenberger*:

The [student] fee is mandatory, and we do not have before us the question whether an objecting student has the First Amendment right to demand a pro rata return to the extent the fee is expended for speech to which he or she does not subscribe. See *Keller v. State Bar of California*, 496 U.S. 1, 15-16 (1990) and *Abood v. Detroit Board of Ed.*, 431 U.S. 209, 235-236 (1977).

*Rosenberger*, 515 U.S. at 840.

In addition to the majority opinion in *Rosenberger* pointing to *Abood* and *Keller* to decide a student fee opt-out case and the issue of collecting student fees, Justice O'Connor in her concurring opinion in *Rosenberger* expressed an openness to the position that the First Amendment principles expressed in *Abood* and *Keller* allow students to opt out of paying into a fund that gives money to campus groups they oppose:

Finally, although the question is not presented here, I note the possibility that the student fee is susceptible to a Free Speech Clause challenge by an objecting student that she should not be compelled to pay for speech with which she disagrees. [Citations to *Keller* and *Abood*]. There currently exists a split in the lower courts as to whether such a challenge would be successful [Citations omitted].

*Rosenberger*, 515 U.S. at 851.

In order to apply the *Abood* principles, the Seventh Circuit used the test enunciated in *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991) because it is the latest in the *Abood-Keller* line of cases: "Beyond *Abood* and *Keller*, the Supreme Court has addressed the issue of germaneness in several other cases...*Lehnert*'s three-prong analysis is the test today." 151 F.3d at 724; Cert. Pet. at 26a. Therefore, the Seventh Circuit applied *Abood* and *Keller*, as this Court directed to do in *Rosenberger*, by using the latest expression of the *Abood* test in *Lehnert*.<sup>1</sup>

In sum, *Rosenberger* in no way undermines the First Amendment principles spelled out in *Abood*, *Keller* and *Lehnert*. Nor does *Rosenberger* sanction the compelled collection of student fees as the University argues. *Rosenberger* addresses how money is distributed -- government cannot engage in viewpoint discrimination when distributing student fee money to campus organizations. *Abood*, *Keller* and *Lehnert* address how student fee money is collected -- government cannot compel students to fund campus advocacy

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<sup>1</sup> The students urged the Seventh Circuit to use a straightforward compelling state interest test, although it was appropriate for that court to have used the *Lehnert* test, because it reflects *Abood* principles. *Lehnert*'s test is, if anything, overly favorable to the petitioner University. *Lehnert*'s test in a union dues case takes into account the "free rider" problem -- a dissenting worker who does not pay union dues still receives the higher wages and benefits negotiated by the union. In contrast, there is no "free rider" issue here, as the Seventh Circuit found. 151 F.3d at 728; Cert. Pet. at 35a. There is no equivalent in a student fee context to the increased benefits won by a union for its workers. The only "benefit" or "service" the students receive from the groups at issue in this case is the one of listening to them advocate their own ideological agendas. The *Lehnert* test represents a weaker standard for student fee cases than the context requires.

groups absent a compelling government interest. Thus, there is no contradiction or conflict between the principles of *Rosenberger* and those of *Abood* and *Keller*, as the Seventh Circuit found.

**B. Forum Analysis Does Not Contradict the Seventh Circuit's *Abood-Lehnert* Analysis.**

The University and the Seventh Circuit dissenters claim that the panel erred by not using forum analysis and rejecting the students' claims because there is a "critical difference between being forced to support the speech of a particular group and being compelled to provide funding to create a forum for speech by any group," Cert. Pet. at 14. This is in error, because students' *Abood* rights are not neutralized in a *Rosenberger* forum.

First, there is nothing inherently contradictory about allowing dissenters to opt out of funding a forum of money that funds organizations advocating ideas the dissenters oppose. There is no conflict in asserting that the First Amendment protects both (1) the right of campus organizations to viewpoint-neutral access to distribution of student fee money and (2) the right of students not be forced to fund objectionable political or ideological advocacy groups. The University can implement both the *Rosenberger* principles and the *Abood* principles simultaneously.

Second, the University glosses over the significant role the student government and the Board of Regents have in selecting who has access to the *Rosenberger* forum of funding. The student government and the Board of Regents in this case have total power to decide which groups have access to the forum of money. They peruse detailed applications, hold hearings and deliberate as legislative bodies to decide which

groups will receive money and how much they will get. A campus organization has no guarantee that the student government will exercise its discretion to give them money, and at the University of Wisconsin, 71% of the student organizations receive no fee money at all.

In contrast, the government plays a much smaller, passive role with a physical forum, like an auditorium or a park. The private groups or individuals, not the government, decide whether they want to access the government's park or auditorium and engage in advocacy. The only role the government has, if any, is a ministerial role to schedule access to the physical forum.

The third reason why *Abood* principles should operate in a *Rosenberger* forum is that when the forum is money, the funded group's advocacy consumes the forum. In order to speak using a *Rosenberger* forum of money, the funded organization must spend the money, thereby "consuming" the forum. A second group cannot reuse the same money because it is gone. In contrast, a physical forum like an auditorium or a park remains after one group uses it for its advocacy to be used later by those with differing viewpoints. Judge Rovner failed to account for this "consumption of the forum" effect when she wrote in dissent, "the burden on objecting students' speech is lessened by the availability of the same funds to present opposing speech." *Southworth v. Grebe*, 157 F.3d 1124, 1126-27 (7th Cir. 1998); Cert. Pet. at 6a. Because the act of advocacy consumes a *Rosenberger* forum, allowing student *Abood* rights to opt out of paying the fee before the advocacy group spends it is the appropriate way to protect the objecting students' right of conscience and right not to speak.

If the University's and the dissenters' reading of *Rosenberger* is correct, then a state university could force



Jewish students to fund a Christian evangelistic newspaper like the one in *Rosenberger*. State universities could force African-American students to fund neo-Nazi or Ku Klux Klan organizations. If there is no right to opt out of paying the fee in this case, then no student can opt out of paying the fee in any context. This harsh result is obviously not what this Court was suggesting in *Rosenberger* as the way to resolve the student fee cases.

There is nothing inherent in the nature of the forum analysis that requires all people to pay to support the forum. The Seventh Circuit did not err by recognizing the students' *Abood-Lehnert* rights in the context of a *Rosenberger* forum.

## II.

### THIS COURT NEEDS TO SEND A CLEAR MESSAGE TO THE LOWER COURTS THAT *ROSENBERGER* AND *ABOOD* ARE NOT IN CONFLICT

The question of whether students can opt out of paying a mandatory fee that funds groups the students find objectionable has percolated among the state and federal appeals courts since the early 1970s. The University detailed the split among the circuits and the state appellate courts. Cert. Pet. at 10-12. As the respondents see it, the Seventh Circuit, the Third Circuit and the California Supreme Court have all recognized a right of students to opt out: *Southworth*, *Galda v. Rutgers*, 772 F.2d 1060 (3rd Cir. 1985) and *Smith v. Regents of the University of California*, 4 Cal. 4th 843, 16 Cal. Rptr.2d 181, 844 P.2d 500 (1993), cert. denied, 510 U.S. 863 (1993).

The cases in clearest conflict with those listed above are the Second Circuit's opinions in *Carroll v. Blinken*, 42 F.3d

122 (2d Cir. 1994) and an earlier appeal in the same case, *Carroll v. Blinken*, 957 F.2d 991 (2d Cir. 1992). The Second Circuit recognized very little *Abood*-type protection for students objecting to funding the New York chapter of the Public Interest Research Group, NYPIRG.

The Fourth Circuit, the Fifth Circuit, and the state supreme courts of Washington, Vermont and Nebraska have rejected students' *Abood* claims to opt out of paying the mandatory fee, generally in the context of funding a student newspaper on campus: *Kania v. Fordham*, 702 F.2d 475 (4th Cir. 1983); *Hays County Guardian v. Supple*, 969 F.2d 111 (5th Cir. 1992), cert. denied 506 U.S. 1087 (1993); *Good v. Associated Students of the University of Washington*, 86 Wash.2d 94, 542 P.2d 762 (1975); *Lace v. University of Vermont*, 131 Vt. 170, 303 A.2d 475 (1973) and *Larson v. Board of Regents of the University of Nebraska*, 189 Neb. 688, 204 N.W.2d 568 (1973).

Some of these earlier decisions did not have the benefit of this Court's 1977 opinion in *Abood*. And none but the Seventh Circuit's decision in *Southworth* had the benefit of this Court's direction given in *Rosenberger* to use *Abood* and *Keller* to decide these student fee cases.

The Seventh Circuit correctly followed the direction of this Court in *Rosenberger* in decide this case. Therefore, the petition for a writ of certiorari should be denied.

The only reason for this Court to grant review in this case would be if this Court desired to spell out more directly the two-part solution for the student fee question that it alluded to in *Rosenberger*: a state university must distribute student fee funds to campus organizations in a viewpoint neutral manner, but the university must protect students' right of individual



conscience by allowing them to opt out of funding campus organizations who engage in advocacy the individual students finds objectionable. In short, *Rosenberger* holds that campus organizations have viewpoint neutral access to funds, but further suggests that a state university cannot force students to fund campus organizations that they find objectionable.

This Court recognized the "distribution" half of this two-part solution in *Rosenberger* and strongly implied that *Abood*'s opt out principles provides the solution to the other half, the "collection" half, of the student fee situation. That is what the Seventh Circuit ruled in this case.

In *Southworth*, the Seventh Circuit correctly followed this Court's lead. The other circuits should be given the opportunity to reconsider contrary precedents in light of *Rosenberger* and *Southworth*. Whatever this Court decides to do, it should make it clear that *Abood* and *Rosenberger* are not in conflict. Students have *Abood* rights that operate in a *Rosenberger* forum.

### CONCLUSION

The petition for a writ of certiorari should be denied.

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Respectfully submitted,

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